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 13

14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE DISTRICT OF ARIZONA

16 IN RE: Bard IVC Filters Products Liability  
 17 Litigation,

No. 2:15-MD-02641-DGC

**JOINT MOTION AND  
 INCORPORATED MEMORANDUM  
 FOR AN ORDER PROTECTING  
 ANY ATTORNEY-CLIENT  
 PRIVILEGE AND WORK  
 PRODUCT REVEALED DURING  
 UPCOMING MOTION FOR  
 PROTECTIVE ORDER**

22 Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively  
 23 “Bard”) and the plaintiffs hereby jointly move for an order protecting any attorney-client  
 24 privilege and work product that may be revealed in conjunction with Bard’s upcoming  
 25 Motion for Protective Order Regarding Discovery of Litigation Consultant’s Report,  
 26 which Bard will file later this month subject to the Court’s ruling on the instant motion, as  
 27 follows:

28 1. On December 15, 2004, Dr. John Lehmann submitted a written report to

1 Bard's Assistant General Counsel, Donna Passero. Bard has asserted that the work-  
2 product doctrine protects Dr. Lehmann's report from discovery or other use during the  
3 MDL. The plaintiffs argue that Dr. Lehmann's report was created in the normal course of  
4 business, and is therefore discoverable and may be used in the prosecution of their cases.  
5 Dr. Lehmann's report was also admitted, over Bard's objections, during a trial in February  
6 2015.

7       2. Before the creation of this MDL, Bard litigated its work-product assertion in  
8 numerous state and federal courts across the country, including in *Alexander v. C. R.*  
9 *Bard, Inc.*, which was pending in the U.S. District Court for the Northern District of  
10 Texas. In *Alexander*, the court held an evidentiary hearing during which Dr. Lehmann  
11 and Bard's Assistant General Counsel, Donna Passero, testified. The witnesses testified  
12 and were cross-examined about the creation and contents of Dr. Lehmann's report; Dr.  
13 Lehmann's retention to prepare the report; adverse events that Bard was receiving  
14 throughout 2004; other reports that Bard was preparing concerning adverse events in  
15 2004; and the contents of a bariatric surgeons panel in February 2005. Portions of the  
16 questions to the witnesses, as well as the witnesses' testimony, concern material  
17 potentially protected by the attorney-client privilege and/or work-product doctrine.  
18 Accordingly, the *Alexander* court sealed the transcript of the evidentiary hearing, entered  
19 an order pursuant to Federal Rule of Evidence 502(d) to protect against any waiver, and  
20 subsequently entered an order that allows the parties to use the evidentiary hearing  
21 transcript in other proceedings in which a Rule 502(d) order has been entered. *See Mot.*  
22 and Doc. Tex. Or., *Alexander v. Bard*, June 26 and July 1, 2014, attached as Exhibit A.

23       3. The parties in the MDL believe that a sealed submission of the *Alexander*  
24 evidentiary hearing transcript, as well as the exhibits submitted during the hearing, will  
25 aid the Court in determining whether Dr. Lehmann's report is protected work product, and  
26 the parties therefore jointly request that the Court enter an order pursuant to Federal Rule  
27 of Evidence 502(d) that any disclosure of protected communications or work-product  
28 material in conjunction with Bard's Motion regarding Dr. Lehmann's December 2004

report shall not constitute a waiver of any such protected communications or work product.

4. Although counsel for the plaintiffs do not concede that material to be submitted to the Court in conjunction with Bard's Motion is protected by the attorney-client privilege or work-product doctrine, the plaintiffs agree that entering a Rule 502(d) order is appropriate for the purposes of determining whether Dr. Lehmann's report is protected work product.

5. For the foregoing reasons, good cause exists for entry of an order under Federal Rule of Evidence 502(d) that provides that any disclosure of protected communications or material shall not constitute a waiver of such protection. Such an order would appropriately protect the attorney-client privilege and work-product doctrine, and the parties have jointly filed a Proposed Consent Order for the Court's consideration.

DATED this 19th day of November, 2015.

## GALLAGHER & KENNEDY, P.A.

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1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on November 19, 2015, the foregoing was electronically filed  
3 with the Clerk of Court using the CM/ECF system which will automatically send email  
4 notification of such filing to all attorneys of record.

5                   s/Amanda C. Sheridan  
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